Nos. 15,252, 15,253, 15,254

United States Court of Appeals

For the Ninth Circuit

MATANUSKA VALLEY LINES, INC., a corporation, and GENERAL CASUALTY COMPANY OF AMERICA, a corporation, LEWIS E. SIMPSON, LOUIS ODSATHER, J. A. COLUMBUS, H. N. BAKER, RUSSELL SWANK and NORMAN G. LANGE, *Appellants*, vs. DOROTHY NEAL and NATHANIEL NEAL, JR., *Appellees*.	No. 15,252
MATANUSKA VALLEY LINES, INC., a corporation, and GENERAL CASUALTY COMPANY OF AMERICA, a corporation, *Appellants*, vs. BLANCHE THOMAS, *Appellee*.	No. 15,253
MATANUSKA VALLEY LINES, INC., a corporation, and GENERAL CASUALTY COMPANY OF AMERICA, a corporation, *Appellants*, vs. WORDIE FRAZIER and PRINCE FRAZIER, *Appellees*.	No. 15,254

On Appeal from the United States District Court for the District of Alaska, Third Division.

REPLY BRIEF FOR APPELLANTS.

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I.

SO-CALLED JUDGMENT AS RES JUDICATA.

The appellees contend that the so-called judgment signed on October 12, 1953 stands as being *res judicata*

as to the issues raised and tried at the trial. Appellants do not understand the law to be such, but rather contend that inasmuch as the so-called judgment of October 12, 1953 no longer exists but stands supplanted by the judgment signed and entered on the 21st day of May, 1956, that the former so-called judgment cannot be taken as *res judicata* particularly in the light of the fact that an appeal has been taken and perfected from the judgment now of record, dated May 21, 1956. The jury verdicts will stand until the appeal presently before the Court is disposed of, and likewise the judgment of 1956 stands also, but does not have the stature of *res judicata.* This judgment certainly could not be pleaded in bar were another action commenced on the same facts presented at the trial, but certainly could be pleaded in abatement until the questions raised concerning this judgment have been disposed of by the Appellate Court. The judgment of 1953, being the former so-called judgment and not complying with Rule 54(b), certainly cannot be considered a final judgment.

The appellees cite the cases of *Winsor v. Doumit* (C.A. 7th 1950), 179 Fed. (2d) 475, and *Lyman v. Remington Rand Co.* (C.A. 2d 1951), 188 Fed. (2d) 306 at page 6 of their brief, which appear to be parallel cases with this Court's opinion in the present case when formerly appealed, appearing at 229 Fed. (2d) 136, concerning the purpose of Rule 54(b) and the requirement of the judgment to comply therewith before a Federal Appellate Court has jurisdiction to hear the matter. With this general proposition appel-

lants are in accord, but submit it furnishes no solution to the question posed in this appeal.

The appellees cite the case of *Kauffman and Ruder, Inc. v. Cohn and Rosenberger,* (C.A. 2d 1949), 177 Fed. (2d) 849, wherein discussion is had concerning a *nunc pro tunc* order, but, of course, this Court in its opinion referred to above fairly concluded that the trial Court could not make its order *nunc pro tunc* and the records reflect that it did not, due to the conduct of the previous trial judge. The appellees also cite a number of other cases at page 7 in their brief, all of which treat the question of Rule 54(b) and reiterate the fact that a purported judgment failing to comply therewith is not final nor appealable. With this proposition the appellants are in agreement, but these cases do not hold that such a defective judgment is in fact *res judicata.* The issues may well be settled but this does not make the defective judgment *res judicata.*

The appellees at page 8 of their brief cite the case of *Tuolumne Gold Dredging Corporation v. Walter W. Johnson Co.,* (D.C. Cal. 1947), 71 Fed. Supp. 111, where the Court, in being presented with a 54(b) situation, held that because the judgment is interlocutory does not preclude a holding of *res judicata* as to the phase finally concluded.

The appellees in their brief at page 8 recite the following language:

> "The fact is that the judgment of October 12, 1953 from which appellants appealed and in connection with which the supersedeas bonds were executed, has never been disturbed; it has only been supple-

mented and made final by the certificate of May 21, 1956.''

Appellants contend that according to this Court's opinion in the first appeal, there never existed a judgment prior to or during the first appeal, and submit that the only judgment in this case was signed and entered on May 21, 1956. Nowhere in the record does there appear an intention on behalf of the appellees or the trial Court that the judgment herein signed and entered May 21, 1956 could relate back to any point in the past. As pointed out, this Court, by its opinion, indicated that a *nunc pro tunc* order in the light of the trial judge's conduct in denying all motions would appear to prohibit the entry of a *nunc pro tunc* order. Accordingly, there is one judgment here and that is the judgment signed and entered May 21, 1956, and it is from this judgment that the appellants have prosecuted this appeal, and it is this judgment which the appellants contend to be erroneous for the reasons set forth in their briefs filed in the former appeal, allowed by this Court to be used in this appeal, and in their briefs now filed supplemental to their original briefs. After the questions therein raised have been heard and disposed of by this Court and judgment is entered on the mandate, then and only then will the judgment of May 21, 1956 be *res judicata.*

II.

SUPERSEDEAS BONDS POSTED IN FORMER APPEAL NOT GOOD AS COMMON LAW OBLIGATION BY REASON OF ABSENCE OF CONSIDERATION.

At the outset, certain observations must be made with regard to the appellees' position concerning the supersedeas bonds here in question. In their brief at page 9 they appear to abandon the assertion that the supersedeas bonds as posted are good as statutory supersedeas bonds. It has certainly been the appellants' contention that the supersedeas bonds are not valid as statutory bonds for the reasons set forth in their opening brief. Also it is important to note that the appellees admit in their brief at page 16 as follows:

> "Although the judgment, under the provisions of Rule 54(b) was not in fact final and therefore could not properly be executed upon, nevertheless, all parties were then treating the judgment as though it were final and enforceable and in fact the trial court had authorized the issuance of execution thereon and execution was in the hands of the Marshal."

Accordingly, as the facts now stand the appellees admit that the supersedeas bonds are not valid as statutory supersedeas bonds, and likewise admit that the so-called judgment was not final as required by 54(b), and therefore, execution could not lawfully be had for the enforcement of such so-called judgment. By this language the appellees admit that that so-called judgment could not have been lawfully enforced had they sought to do so. With this appellants agree,

and in the light of this fact, find it difficult to understand how it could be claimed there can be any consideration for a common law obligation. Most of the cases in holding a supersedeas bond void as a statutory obligation, but valid as a common law obligation, support this finding with a finding that the consideration for this obligation was the forbearance of execution under the impression that execution was stayed and accordingly, a detriment to the obligee or the appellant having obtained a hearing on the merits and a decision in the Appellate Court, and thus a benefit to the obligor. It is apparent that neither have the appellees suffered a detriment by voluntarily refraining from enforcing their so-called judgment in that the appellees admit that such so-called judgment could not have properly been enforced by execution, nor have the obligors received a benefit by way of the appeal. Certainly the fact that the appellees refrained from doing or attempting to do that which they could not lawfully do is not sufficient consideration to support the common law obligation. This Court in the former appeal dismissed such appeal for failure to present a final judgment, and thus, this Court was without jurisdiction and rendered a decision on the merits.

The appellees cite the case of *Haffner v. Commerce Trust Co.*, 86 P. (2d) 331 in their brief at page 10 for the proposition that though a bond be void and unenforceable as a statutory obligation, it may, if supported by sufficient consideration, be enforceable as a common law obligation. With this general statement of the law appellants have no quarrel. However,

it is appellants' contention that the bonds as posted herein cannot be valid as a common law obligation for the reason that they want consideration sufficient to support the promises contained therein. In the *Haffner* case a judgment was recovered by the plaintiff in the trial Court, and the defendant noticed appeal after the statutory period within which notice was required had elapsed. The Appellate Court dismissed the appeal for the reason that the period in which the appeal could be noticed had expired. Following the notice of appeal the defendant had posted a supersedeas bond, and the action in the *Haffner* case was directed towards recovery on the bond as posted. The judgment creditor brought his action against the principals and sureties on the bond and recovered judgment in the trial Court. From this judgment the principals and sureties appealed. The appellants therein contended that the bond, by virtue of the fact that it was unauthorized due to the lapse of time for noting appeal, was a nullity. The appellee responded that the action on the supersedeas bond was good, in that even though it was not valid as a statutory supersedeas bond, it was valid as a common law obligation. The appellee contended that the bond was without consideration and the Court recited in response to this contention that of course, consideration is an essential element to every valid contract. Concerning the consideration supporting the common law obligation in the *Haffner* case, the Court stated:

> "All of the benefits to be derived by the obligors to the detriment of the obligees by the giving of the bond has been enjoyed."

The Court further recited that:

> "Execution on its judgment against them had been delayed during the entire period that their appeal was pending. The benefits of execution thus foregone by the plaintiff is sufficient consideration for the contractual obligation assumed by the defendants under the bond in question."

Further in regard to the question of consideration, the Court stated, quoting from a previous case in that jurisdiction, at page 34 of its opinion:

> ". . . The court has not been concerned with whether the stay was obtained as a matter of right rather than as a matter of fact, and we consider it pretty well settled in this jurisdiction that if the end sought by the filing of the undertaking is obtained, if execution is stayed, there is liability on the undertaking . . ."

With this statement of the law appellants have no quarrel, but point out that in the case presently before this Court, the appellants have enjoyed no stay of execution, either in law or in fact, as a result of posting the supersedeas bonds inasmuch as appellees have admitted that execution could not properly have issued for the enforcement of the former so-called judgment as it was not in fact a final judgment.

The appellees next cite the case of *Maryland Casualty Company v. Marshall,* 10 S.W. (2d) 485 at page 10 of the appellees' brief, and set forth a substantial portion of the Court's opinion therein. In that case as in the case before this Court, the bonds appeared to be invalid as a statutory obligation. The Court in

that case went on to consider the bonds from the viewpoint of common law obligations. With regard to these bonds the Court stated, as appears from the language quoted on page 11 of the appellees' brief:

> ". . . They were entered voluntarily, as the Collieries Company and the Maryland Casualty Company had the options of paying the judgments against the Collieries Company, of permitting their enforcement through the processes of the Court, of taking the chance that the plaintiffs would not undertake to enforce them until this court had passed upon them, or of attempting to stay them by the execution of the bonds, and it chose the latter alternative . . ."

Accordingly, from the language quoted by the appellees, it appears without question that the judgment creditor therein could have properly enforced his final judgment by a writ of execution. Apparently, though the bonds were not good as statutory obligations, the appellee therein refrained from taking execution to enforce his judgment, and accordingly, the Court concluded that this forbearance was sufficient consideration to support the common law obligation. Therefore, and again referring to the language quoted by the appellees at page 11 of their brief where the Court stated:

> ". . . The consideration for this undertaking which the Collieries Company and its sureties sought and expected by the execution of these bonds was the stay of the execution of the judgments in question. *Although not obliged to do so, since the bonds were not good as statutory bonds, yet as a*

> *matter of fact the appellees, relying upon the undertaking of the Collieries Company and the appellant, did forbear to enforce their judgments, and so the obligors by reason of their promise did in fact secure the stay of execution which they sought.''* (Emphasis supplied.)

Again, with regard to the *Maryland Casualty Company* case, the appellants have no quarrel with the statement of law set forth therein where one standing as a judgment creditor and entitled to the enforcement of his judgment by execution, refrained from doing so. This, of course, is not the case presently before this Court in that as admitted by the appellees, they did not stand in a position where they could enforce the so-called judgment by execution, but quite the contrary, could not properly have levied execution for the enforcement of the so-called judgment. It is true the so-called judgment was not enforced, but appellants submit this was for the reason that it could not properly be enforced, and not for the reason that the appellants had posted supersedeas bonds. While appellees may contend that they believe that the judgment was good and was effectively stayed, and accordingly did not enforce their judgment, the fact remains that regardless of what the appellees believe, they could not in any event have lawfully enforced the former so-called judgment. Therefore, this fact distinguishes the present case before the Court from those cases in which one holds an enforceable judgment and wrongly believes that he is not entitled to enforce the same by virtue of the existence of a stay bond. In the latter

case, of course, the stay is in fact accomplished, whereas in the case before this Court no stay was allowed in that execution could not properly have issued.

The appellees at page 12 of their brief cite without setting forth applicable portions of the opinion, the cases of *Hewitt v. Landis*, 225 P. 842, and *Lloyds Casualty Insurer v. Ferrar, et al.*, 174 S.W. (2d) 302. In both of these cases there existed a valid judgment, enforceable by execution. Accordingly, these cases are subject to the same distinction as above pointed out concerning the *Maryland Casualty Company* case.

The appellees further cite at page 10 of their brief, an annotation in 120 A.L.R. at page 1062. This annotation deals partially with the question of a common law obligation on a supersedeas bond, but the language used by the annotator following which cases are cited, distinguishes it from the facts of the case here in question. The annotator recites at page 1062:

> "The sureties generally are held liable on a supersedeas or appeal bond although it was legally insufficient to effect a stay of proceedings *where as a matter of fact there was a stay,* no execution being issued, nor any attempt made to collect an execution if issued, or to enforce the judgment." (Emphasis supplied).

Such language presumes the existence of a final judgment enforceable by execution. The annotator goes on to recite at page 1065:

> "The rule is well settled that although a supersedeas bond not valid as a statutory bond must,

to be enforceable as a common law bond, have a sufficient consideration, *the receipt by the obligors of the contemplated benefits of the bond in the stay or suspension of proceedings on the judgment is a sufficient consideration for the bond.*" (Emphasis supplied).

Therefore, this language seems inappropriate when applied to the facts of the case presented to this Court on appeal in that the obligors have received no benefit by the appeal nor was there in fact a stay, for there was no judgment to be enforced by execution.

III.

NO ESTOPPEL ARISES AGAINST THE APPELLANTS BY VIRTUE OF HAVING RECEIVED THE SO-CALLED JUDGMENT IN THE SUPERSEDEAS BONDS, NOR BY REASON OF A DETRIMENT TO THE OBLIGEE OR A BENEFIT TO THE OBLIGOR.

The former so-called judgment, the recital of which the appellees contend now estops the appellants from asserting a failure thereof and the lack of benefit to the obligor and detriment to the obligee as grounds for exoneration of the bond and discharge of the sureties, was prepared and furnished to the court by the appellees as was their responsibility as the prevailing party under the Uniform Rules of the District Court for the District of Alaska which became effective on April 30, 1953, and in particular, Rule 27 which is set forth in full:

"Judgments: Unless the court or judge thereof otherwise orders, every judgment must be prepared by counsel for the successful party and a

> copy thereof served on the opposing counsel and bearing his endorsement of service before the same is delivered to the judge for his signature."

This rule may be found in 14 *Alaska Reports* at page XLIX. This is not an uncommon requirement of local rules to require the prevailing party to prepare the judgment to which he has been found to be entitled. See *Commission Row Club v. Lambert,* 161 S.W. (2d) 732, where the court stated:

> "If this decree is in form and substance erroneous, the plaintiff is not entirely without fault because under the rules of procedure in our courts, the duty rests upon the successful litigant to see that the judgment is sufficient in form and substance."

Accordingly, the duty was upon the appellees here to present to the court a judgment, "sufficient in form and substance." It is apparent that in this, they failed. Further, the appellants subsequent to the signing and entry of such judgment, moved to have the error of the appellees corrected by their motion for revision in which they asked the court to revise the judgment to comply with Rule 54(b) of the Federal Rules of Civil Procedure. (R-14,529, P. 19; R-14,530, P. 15; R-14,531, P. 17). Thus, it was that some ten days following the signing of the erroneous judgment prepared by the appellees that their error was called to their attention. The record is completely bare of any conduct indulged in by the appellees in an effort to perform the duty which was incumbent upon them as the prevailing party to correct the judgment presented by them. Nor did they join in the motion of the

appellant, Matanuska Valley Lines, Inc., and accordingly, the motion was subsequently denied by the trial judge and the appeal was taken.

Concerning now the question asserted by the appellees of estoppel, the appellees at page 13 of their brief cite the case of *Robertson v. Wilkinson,* 10 Fed. (2d) 311 at page 312, where the Court states a general rule without reciting the basis therefor. There appears no discussion of the factual situation upon which this statement is based, and accordingly, appellants submit that it can be of little assistance in the solution of the problem presented to this Court concerning the question of estoppel. In fact, nowhere in the Court's opinion does it mention the word estoppel, nor are the principles discussed.

The cases cited by the appellees in asserting an estoppel commence at page 13 through 16 of their brief. These cases concerning estoppel fall generally into two classes.

The first class presents a fact pattern wherein a valid and final judgment was recovered by the judgment creditor, an appeal was perfected, a supersedeas bond posted, a stay in fact accomplished, the trial Court is affirmed on appeal and then liability is sought to be enforced on the bonds. At this step in the fact pattern the obligor attempts to raise a question concerning the proceedings had by the trial court when no question had been raised prior to the appeal or the obligor claims the appellant failed to perfect his appeal properly. In this first class of cases, the courts hold that the obligor has received the benefit of the

appeal by virtue of the stay and the contemplated review and decision on the merits, and though the stay accomplished may not have been as a result of the supersedeas bonds, there has been accomplished a stay in fact by reason of the reliance on the part of the obligee in failing to seek enforcement of his judgment by way of execution. In this class of cases fall the cases cited by the appellees as follows: *McCarthy v. Alphons Custodis Chimney Const. Co.* (Ill. 1906) 76 N.E. 850; *Perry v. Tacoma Mill Co.* (CCA 9th, 1907) 152 Fed. 115; *Pierce v. Banta* (Ind. 1892) 31 N.E. 812; *Buttnick v. Buttnick Jobbing & Investment Co.,* (Wash. 1924) 227 P. 852.

The second class of cases present the factual picture where a final judgment has been entered and an appeal is taken, in the process of which a supersedas bond is posted. Subsequently the appeal is dismissed because an appeal is not allowed due to jurisdictional amount or failure to give the requisite notice within the time allotted, and subsequent thereto the liability on the bonds is asserted. The courts in those cases raise an estoppel against the obligor, basing such estoppel on the benefit received by virture of the stay in fact accomplished, though perhaps the bond as posted was not valid as a statutory bond, and the obligee refrained from enforcing his final judgment by execution believing that he was prevented from doing so by virtue of the existence of the stay bond. The courts conclude that though he could have enforced his judgment, he in fact, did not and accordingly, the benefit of a stay had accrued to the obligor.

The appellees cite the case of *Robertson v. Wilkinson* (CCA 5th 1925), 10 Fed. (2d) 311 at 312 at page 13 of their brief, and the case of *Tanguary v. Beshor* (Colo. 1908) 94 P. 22, wherein a rigid rule is recited and in the former case, with no reasons for the rule. In the *Robertson* case, the Court simply recites the rule without any particular reasoning set forth to determine the basis of the Court's ruling. The latter case, the *Tanguary* case, seems to lay down an absolute rule of liability which appellants submit is contrary to the weight of authority in the light of the cases cited by the appellees.

The Court in the case of *W. J. Donnelly Co. v. Fidelity & Casualty Company* (Ohio 1926) 155 N.E. 558, in its opinion, cited by the appellees at page 15 of their brief, recites the fundamental purpose of an appeal as follows:

> "The purpose and object of an appeal in judicial proceedings is generally twofold: (1) to enable the losing party to obtain a new trial in a higher court, and thereby possibly escape what he conceives to be an unjust judgment; and (2) to stay issuance of an execution against him."

In raising an estoppel, the Courts look to determine the benefit obtained by the obligor in either one or both of the two instances recited by the Court in the *Donnelly* case. They also look for a detriment incurred by the obligee as a result of his forbearance in enforcing his judgment where he believes, though mistakenly, he is prevented from enforcing his judgment by virtue of a statutory supersedeas bond.

These cases cited by the appellees and their factual patterns are distinguishable from the factual pattern presented by this case on appeal in that the appellees did not possess a final judgment at the time of the execution of the bonds which could be enforced by way of execution. Thus, the appellees did not forbear execution by way of the supersedeas bonds, but could not have lawfully had execution for the enforcement of the so-called judgment by reason of its defects as admitted by them in their brief at page 16. Accordingly, no benefit by way of freedom of execution has accrued to the appellants as a result of any forbearance as certainly the forbearance implies the refraining from doing that which one may lawfully do. Likewise, the appellants have not received the benefit of the appeal by the review of the proceedings in the lower Court due principally to the failure on the part of the appellees to perform that duty which was theirs, to-wit: to present a judgment sufficient in form and substance to the trial Court, and then failing to join with the appellant, Matanuska Valley Lines, Inc., when the appellant moved in the trial Court to correct the defective judgment.

Referring once again to the case of *Hampshire Arms Hotel Company v. St. Paul Mercury & Indemnity Company,* 9 N.W. (2d) 413, cited by the appellants in their initial brief, therein additional language appears at page 15 as follows:

> "The dismissal of the appeal was in effect an adjudication that the appeal and consequently the bond was void. The adjudication operates to es-

> top plaintiff from asserting that the bond was valid or that the attempted appeal was consideration for it."

Accordingly, in the instant case appellants assert that by reason of the fact that the appellees failed in performing the duty which was theirs as prevailing litigants to provide the Court with a judgment sufficient in form and substance, and in addition, failed to join in the motion of the appellant, Matanuska Valley Lines, Inc., to correct such judgment, that for this reason they are now estopped to raise an estoppel against the appellants to estop them from asserting that the foundation for the entire proceeding was void and that the bonds were of no force and effect.

This Court has had occasion to consider a problem of a similar nature presented to it in this case, in the case of *National Surety Company v. United States,* (CCA 9th) 29 Fed. (2d) 92.

In that case liability on a bail bond was in question which arose out of an application for a writ of habeas corpus which subsequent to hearing was discharged. The defendant petitioned for appeal and filed an appeal bond in the amount of $10,000.00. The matter was then considered on appeal and the trial Court was affirmed in *Unverzagt v. United States* (CCA 9th) 5 Fed. (2d) 494. Subsequently in the *National Surety Company* case the government sought to forfeit the bond for failure of the defendant to appear pursuant to the terms of the bond. Trial was had and the trial Court took judicial notice of matters appearing in its records concerning the defendant having been called

upon to appear. The trial Court awarded judgment in favor of the government and the surety company appealed. The judgment was reversed in the *National Surety* case for the failure of the government to prove by introducing a portion of the record showing an entry to the effect that the defendant had, in fact, been called upon to appear. However, in the *National Surety* case, the Court discussed the question of the validity of a bond where no appeal was allowable because there was no final judgment or order. At page 97 of its opinion, the Court, speaking through Judge Hunt, stated as follows:

> "It is not to be disputed that ordinarily, if appeal is not permissible, action cannot be maintained on an appeal bond. Should an appeal on a bail bond be dismissed by the Circuit Court of Appeals before it takes jurisdiction, action cannot properly be had on the appeal bond because of lack of consideration for the bond; but where an appeal is taken even though improperly taken and improperly allowed and the court takes jurisdiction, the bond on appeal is valid, and action upon the same will lie for the reason that there is a consideration for the bond, and the principal has been released in consideration of the execution of the bail bond. In the Unverzagt case the Circuit Court of Appeals took jurisdiction of the appeal; therefore, action will lie on the appeal bond because of the failure of Unverzagt to obey the order of the district court. In other words, an estoppel arises against those who obtain the contemplated advantages pending the disposition of the appeal, and they are estopped from denying their liability when the bond has served the purpose for which it was given."

In the *Unverzagt* case cited above, the appellate Court heard the appeal and affirmed the trial Court. Accordingly, the language of Judge Hunt where he refers to the Court of Appeals taking jurisdiction must mean that the Court hears the matter on the merits and renders a decision. Thus, it follows that in the event the appellate Court does not take jurisdiction, recovery cannot be had on the bond and no estoppel arises inasmuch as no consideration has passed. This, appellants submit, is precisely what has occurred in the instant case where the appeal was presented to this Court and dismissed on jurisdictional grounds for the failure of the trial Court to enter a final judgment in conformance with the rules. This failure on behalf of the trial Court was joined in by the appellees in their failure to perform the duties which were incumbent upon them. Judge Hunt refers to the question of estoppel and bases such estoppel upon the receipt of contemplated advantages. It is difficult to see where the appellants have received any benefit or advantage by way of the first and abortive appeal, inasmuch as they neither received the benefit of a hearing and decision on the merits, nor did they enjoy freedom from execution for the reason that the so-called judgment could not properly have been executed upon.

Thus, appellants contend that no estoppel should be raised preventing them from questioning the validity of their liability on the bonds for the reasons set forth above. Further, that in the event an estoppel should be raised, this estoppel should be put at large by an estoppel raised by virtue of the fact that the appel-

lees failed in their obligation to present the Court with a judgment sufficient in form and substance, and accordingly, the appellees are the primarily responsible parties for the predicament they now complain of.

IV.

THE TRIAL COURT ERRED IN CONTINUING THE BONDS.

The bonds in question here reflect that they were executed by corporate sureties and a number of individuals. Appellees contend that the insolvency of Matanuska Valley Lines, Inc. is not to be considered in dealing with the question of extension of these bonds, but is the chief reason why they should be continued. The appellees refer to the usual situation where a principal becomes insolvent, but this is not the usual case in that the bonds were executed at a time when the principal was solvent and doing business, and the denial by the trial Court of appellants' motions which, in effect, continued the bonds, occurred after the principal had become insolvent and was in the hands of a receiver. Accordingly, while the sureties here could well look to the ability of Matanuska Valley Lines, Inc. to pay the judgment at the time of executing the bonds in question, after their insolvency and the creation of the receivership when the bonds were extended, there was no question but what the principal could not pay and the sureties' liability was absolute in the event of an affirmance.

V.

CONCLUSION.

The appellants submit that the appellees' argument in its brief is to be distinguished from the case at bar for the reason that the cases which they refer to all contain a valid and enforceable judgment. As has been demonstrated, this is not the factual situation in the case at bar when the bonds in question were executed. Accordingly, the continuation of the bonds by the trial Court was error and it should be reversed.

Dated, May 1, 1957.

Respectfully submitted,
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